Supreme Court, U.S.
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No. 06- 06-57

IN THE

Supreme Court of the United States

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI, in their individual capacities and dba Ridge Crest Farms, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and the COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

DANIEL E. BRANNEN JR.
Counsel of Record
7518 Old Santa Fe Trail
Santa Fe NM 87505
(505) 820-2158

THOMAS A. LINZEY
COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND
675 Mower Road
Chambersburg PA 17201
(717) 709-0457

Attorneys for Petitioners

201196

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In parents' wrongful death and survival case under state law, does a statute of limitations that extinguishes the parents' claims before they knew or could have known who caused the infections that killed their son violate their Due Process, Equal Protection, or Privileges and Immunities rights under the Fourteenth Amendment?

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OPINIONS BELOW

The initial opinions of the Court of Common Pleas of Dauphin County dated October 14, 2003, and June 30, 2004, are not reported. They appear in Appendix C and B, respectively. The opinion of the Commonwealth Court of Pennsylvania dated September 15, 2005, affirming the lower court, is reported at *Pennock v. Lenzi*, 882 A.2d 1057 (Pa. Cmwlth. 2005), and appears in Appendix A. The order of the Supreme Court of Pennsylvania denying petitioners' petition for allowance of appeal (which is the procedure for discretionary review in Pennsylvania) is reported at *Pennock v. Lenzi*, 897 A.2d 462 (Table) (Pa. 2006), and appears in Appendix D.

STATEMENT OF JURISDICTION

The basis for jurisdiction in this Court is 28 U.S.C. § 1257.

The opinion and order of the Commonwealth Court of Pennsylvania for which review is sought was entered on September 15, 2005. (App. A.) The Supreme Court of Pennsylvania denied petitioners' petition for allowance of appeal (the procedure for discretionary review in Pennsylvania) by order entered April 19, 2006. (App. D.)

As the Pennsylvania Department of Environmental Protection is a party to this matter, notice is not required under Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., Amend XIV, section 1, clause 2

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Pennsylvania Consolidated Statutes, section 5524(2)

Limitation of Time; Civil Actions and Proceedings; Two year limit

The following actions and proceedings must be commenced within two years:

> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

Title 42, Pennsylvania Consolidated Statutes, section 5502(a)

Limitation of Time; General Provisions; Method of computing periods of limitation generally

The time within which a matter must be commenced under this chapter shall be computed . . . from the time the cause of action accrued.

STATEMENT OF THE CASE[1]

On April 1, 1995, we watched as our son Danny flatlined in a Reading, Pennsylvania, hospital bed.[2] Two weeks prior, Danny had been a healthy teenager playing basketball in our backyard.

It is bad enough when parents are forced to watch their children die before their eyes from causes that are known. It is worse when a child sickens from an unknown cause, and parents are forced to watch helplessly as their child struggles to survive without knowing how to help or even whom to hold accountable.

The doctors told us that our son died from staphylococcus aurea and rotavirus infections. Despite having an attorney review our son's records, it was not until February 2001 that we learned those infections could be caused by land applied sewage sludge, a substance that had been spread on farmland across the street from our home in Robesonia, Berks County, Pennsylvania, for seven years leading up to Danny's death.

When we attempted to hold people and agencies accountable for the death of our son by filing a wrongful death lawsuit in Pennsylvania courts within two years after

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1. Because this case involves the death of their son, and because this Court is their last resort for justice, Russell and Antoinette Pennock have chosen to author the Statement of the Case as a first-person narrative.

2. The Complaint in this case was dismissed on preliminary objections. Hence, this rendition of the facts comes primarily from the Complaint, which the Courts were bound to accept as true in ruling on preliminary objections.

learning the cause of Danny's death, we were told that we were barred from filing our suit by the statute of limitations. We were told that we were prohibited from filing suit *even though we could not have filed a lawsuit within the statute of limitations.*

The question in this case is whether we have a constitutional right to file this wrongful death and survival suit within the statutory time period from when we knew or should have known the culprit, or causation, in Danny's death.

We have learned more than we ever wanted to know about sewage sludge during the last five years. We have learned that sewage sludge is the liquid and solid sludge and residue produced by municipal sewage collection and treatment systems and from septic and holding tank pumpings from commercial, industrial, and residential establishments. 25 Pa. Code § 271.1. In short, sewage sludge is everything that is flushed down toilets in homes, businesses, hospitals, and industrial facilities. For years, the United States disposed of sludge by dumping it in coastal waters. After discovering that this practice was killing marine life, the U.S. Environmental Protection Agency (EPA) designed a "beneficial use" program that allows sludge to be spread on farmland where food is grown. 40 C.F.R. Part 503. Some sewage sludge is treated by adding lime that is supposed to reduce deadly pathogens in sludge.

In Pennsylvania, the sewage sludge program is administered by the respondent Department of Environmental Protection (DEP), and in our hometown by the respondent Berks County Conservation District. In September 1987, respondents Richard and Carmine Lenzi, doing business as

Ridge Crest Farms, received a permit from DEP to spread sewage sludge on farmland owned and operated by respondents Melvin, Gale, Esther, and Clarence Gelsinger. The farmland is across the street from our house, and the Lenzis spread sludge there from 1988 until around Danny's death in April 1995. Respondent Rettew Associates is an engineering firm that the Lenzis hired to oversee the sludge spreading process conducted by Ridge Crest Farms and the spreading of sludge at the Gelsinger farms.

Pennsylvania regulations and the Lenzis' permits required respondents to mark land that was receiving sludge with "physical markers, such as survey flags," to notify neighbors thirty days in advance of land application, and to restrict public access to sludged land for thirty days after application. Respondents violated each of these regulations during their seven-year sludging program at Gelsinger farm. Respondents never marked land being sludged. They failed to notify us prior to each land application. They failed to restrict our access to sludged land. In fact, respondents allowed Russell and our sons, Danny and Dario, to hunt on sludged land without warning us that the land had been sludged and without informing us that sludge can contain deadly pathogens.

On March 15, 1995, Danny was our healthy 17-year-old son playing basketball at home. The next day he noticed the first symptoms of an illness that hospitalized him on March 19. Cultures taken by the intensive care unit that day revealed that Danny had a staph infection. He also had a rotavirus infection. Danny was ultimately intubated due to his difficulty in breathing caused by perforations that had developed in his lungs as a result of the staph infection. On April 1, 1995, our son died.

For almost six years following Danny's death, we had no idea how he had contracted the infections that killed him. We did not know, and could not have known, who and what were responsible for the death of our son.

On February 25, 2001, a daily newspaper called the *Reading Eagle* published an article on the topic of sewage sludge and whether its application to farm fields as fertilizer is properly regulated and safe. The article contained opinions and analysis by former EPA microbiologist Dr. David L. Lewis on the pathogens found in sewage sludge. The article also described the illness and death of an 11-year-old boy, Tony Behun, who died in 1994 after exposure to sewage sludge in Rush Township, Centre County, Pennsylvania.

After reading that article, we contacted Dr. Lewis, who reviewed Danny's medical records and determined that the rotavirus and staph infections found in Danny were contracted from his prolonged exposure to the dust and fumes emitted from the pathogens in sewage sludge. According to Dr. Lewis, "the lime stabilization process used to treat Class B sewage sludge prior to land application has the effect of, when the lime dust is inhaled, opening and exposing an individual's lungs in the mucus membrane and the mouth and throat areas so that the individual is more susceptible to these pathogens. As a result, skin and respiratory problems develop, such as skin irritation, difficulty in breathing, congestion, burning lungs, coughing and sinusitis, and from these, the infections occur." As we learned, staph and rotavirus infections contracted from sewage sludge can cause death.[3]

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3. After a distinguished thirty-one year career with EPA, Dr. Lewis was fired in May 2003 for his published, peer-reviewed concerns about the sewage sludge program.

On behalf of Danny, we filed our wrongful death lawsuit in the Dauphin County Court of Common Pleas on February 21, 2003, less than two years after publication of the newspaper article that led us to sewage sludge as the culprit in Danny's death. In the Complaint, we preserved our argument that the discovery rule tolled the statute of limitation by alleging, "Plaintiffs first became aware of the dangers associated with exposure to sewage sludge in February of 2001" and, "It was from Dr. Lewis' analysis and the reported symptoms experienced by Tony Behun that the Plaintiffs first became aware of the link between sewage sludge and their son's death."

In the Court of Common Pleas, some of the respondents filed preliminary objections to dismiss our Complaint under the two-year statute of limitations for wrongful death and personal injury claims:

> The following actions and proceedings must be commenced within two years:
>
> > (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

42 Pa.C.S.A. § 5524(2).

> The time within which a matter must be commenced under this chapter shall be computed . . . from the time the cause of action accrued.

42 Pa.C.S.A. § 5502(a).

In our brief and oral argument in opposition to dismissal, we asserted that barring us from the courthouse before we knew or could have known the culprit in, or causation of, Danny's deadly infections violated our rights under the Fourteenth Amendment (and under state constitutional rights not at issue before this Court). The brief specifically contained arguments headed: "Denying the Plaintiffs the Protection of the Discovery Rule Violates the . . . Privileges and Immunities Clause of the U.S. Constitution"; "Denying the Plaintiffs the Protection of the Discovery Rule Violates the Equal Protection Clause of the U.S. . . . Constitution"; and "Denying the Plaintiffs the Protection of the Discovery Rule Violates the Due Process Clause of the U.S. . . . Constitution."

By order and opinion of October 14, 2003 (*see* App. C at 26a–27a), the Court of Common Pleas dismissed our Complaint against Ridge Crest Farms, the Lenzis, the Gelsingers, and the Berks County Conservation District on the ground that our wrongful death and survival claims were barred under the two-year statute of limitations. Relying on *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987), the court rejected our assertion that under the discovery rule, the statute was tolled until we reasonably could have discovered the cause.

In *Pastierik*, the Supreme Court of Pennsylvania held that the discovery rule may not extend the time for bringing wrongful death and survival actions beyond two years after death. The Court made this ruling despite the fact that it applies the discovery rule to claims for personal injury under precisely the same statute of limitation that applies to wrongful death and survival claims. 42 Pa.C.S.A. § 5524(2);

Fine v. Checcio, 870 A.2d 850 (Pa. 2005). *Hence, if Danny had lived, he could have sued after February 2001 under the benefit of the discovery rule, but since he died, wrongful death and survival claims stemming from the same misconduct are barred.*

By order and opinion of June 30, 2004 (*see* App. B), the Court of Common Pleas dismissed our Complaint against Rettew Associates for failure to state a claim. In its opinion, the court denied our request for leave to amend against Rettew, reasoning that amendment would be futile in light of the Court's prior ruling that the statute of limitations barred the claims against other defendants (*see* App. B. at 24a–25a).

The court's rulings left the Complaint unresolved with respect to respondent DEP. However, based on our stipulation that we would voluntarily dismiss DEP if the statute of limitations ruling withstood appeal, the Court of Common Pleas entered a determination of finality on July 26, 2004, making the Court's prior rulings final, appealable judgments on that date.

We appealed as a matter of right to the Commonwealth Court of Pennsylvania. In our brief, we again asserted that extinguishing our claims before we knew, or could have known, the culprit violated our rights under the Fourteenth Amendment. Hence our first statement of question involved was, "Does extinguishment of wrongful death and survival claims before plaintiffs could discover the culprits violate . . . the Privileges and Immunities, Due Process, or Equal Protection Clauses of the U.S. Constitution?"

By order and opinion of September 15, 2005 (*see* App. A), the Commonwealth Court affirmed, rejecting our argument that the statute of limitations as applied violated our constitutional rights under the Fourteenth Amendment. *Pennock v. Lenzi*, 882 A.2d 1057 (Pa.Cmwlth. 2005). The Court held: "we conclude that the statute passes constitutional muster under . . . the [Equal Protection Clause of the] Fourteenth Amendment" (App. A at 14a); "the Pennocks' state and federal due process claims fail for the same reasons" (App. A at 14a); "We also must reject plaintiffs' argument that *Pastierik* violates the privileges and immunities clause of the United States Constitution" (App. A at 15a); and "Accordingly, we see no constitutional error in common pleas' application of *Pastierik* to the present case" (App. A at 16a).

We filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. By order of April 19, 2006 (*see* App. D), the Court denied our petition, exercising its discretion to decline to review the case. *Pennock v. Lenzi*, 897 A.2d 462 (Table) (Pa. 2006). Now, in our last chance for justice in Danny's death, we seek discretionary review by this Honorable Court.

REASONS FOR ALLOWANCE OF THE PETITION

The Commonwealth Court of Pennsylvania has decided an important federal question of constitutional law that has not been, but should be, settled by this Court: does the Fourteenth Amendment require states to apply the discovery rule to the statute of limitations when the plaintiff could not,

with the exercise of reasonable diligence, know the facts of both injury and causation within the statutory time limit?[4]

I. Review Is Warranted to Settle Whether Extinguishing Claims under a Statute of Limitations without the Discovery Rule Violates Due Process by Failing to Provide a Meaningful Opportunity to Sue

There is no doubt under this Court's jurisprudence that a state statute of limitations satisfies the Due Process Clause of the Fourteenth Amendment if it provides a "meaningful time" to present a claim in a "meaningful manner," *Logan v. Zimmerman*, 455 U.S. 422, 437 (1982), and if it provides a "reasonable time" in which to bring a lawsuit, *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190, 196–97 (1922).

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4. The Supreme Court of Pennsylvania has not specifically addressed whether extinguishing claims without application of the discovery rule violates the federal Constitution. Waiting for it to do so before granting certiorari, however, will prevent this Court from ever addressing this important federal question. The Supreme Court of Pennsylvania denied review of the Commonwealth Court's decision here. Meanwhile, the Commonwealth Court said, "we flatly reject the notion that in deciding . . . *Pastierik* our Supreme Court was unmindful of its obligation to interpret statutory law in accordance with constitutional mandates" (App. A at 7a). Furthermore, in the nineteen years since *Pastierik* was decided, the General Assembly of Pennsylvania has not acted to amend the statute of limitations to alter the Supreme Court's dichotomous interpretation of the uniform language that applies to personal injury, wrongful death, and survival claims alike. Hence, the judicial and legislative systems of Pennsylvania consider settled the question whether extinguishing claims without application of the discovery rule violates the federal Constitution. After nineteen years, the issue is overripe for consideration by this Court.

It is equally clear, however, that the Court has never addressed the constitutionality of state statutes of limitation when the claimants did not know, and could not have known, the facts of both injury and causation within the statutory time limit. *See, e.g., United States v. Kubrick*, 444 U.S. 111 (1979) (holding that accrual of a cause of action under the Federal Tort Claims Act happens when the plaintiff knew or should have known the facts of both injury and causation). Stated another way, this Court has never addressed whether the Fourteenth Amendment entitles litigants to the tolling period of the discovery rule in the application of a statute of limitations.

This is an important federal question because it involves the fundamental right of access to the courts. In *Chambers v. Baltimore & O.R. Co.*, the Court said the right of access to state courts "is one of the highest and most essential privileges" of state citizenship. 207 U.S. 142, 148 (1907); *see also Bill Johnson's Restaurants., Inc., v. N.L.R.B.*, 461 U.S. 731, 741 (1983) ("the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"); *United Mineworkers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967) (right to petition government for state unemployment compensation claims protected by Fourteenth Amendment). This means the right of access to state courts is a fundamental right, so any infringement of the right must satisfy strict scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[5]

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5. In dictum in *Parham v. Hughes*, the Court said, "It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." 441 U.S. 347, 358 n. 12 (1979). Petitioners here do not intend to make the narrow argument that a wrongful death claim is a fundamental right, but rather the broader argument that the right of access to the courts for all legitimate claims is fundamental.

See Clark v. Jeter, 486 U.S. 456, 461 (1988) (statutory "classifications affecting fundamental rights . . . are given the most exacting scrutiny").

Whether a statute of limitations that extinguishes claims before the claimants could have known whom to sue infringes the fundamental right of access in a manner that violates the Due Process Clause is a federal question yet unanswered, and worthy of being settled, by this Court.[6] Under either strict scrutiny or rational basis review, whether the "opportunity" to sue is "meaningful" when the claimants are

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6. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), this Court said that the shelter of a statute of limitations is not a fundamental right of a defendant, so that claims may be revived after statutory extinguishment without offending due process: "Their shelter [that of statutes of limitations] has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual." Courts nationwide have misconstrued this language to hold that statutes of limitation do not implicate fundamental rights of plaintiffs, including the fundamental right of access to the courts. *See, e.g., Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555 (3rd Cir. 1985). Clearing up this misconstruction of *Chase Securities* is another reason review is important, as the Commonwealth Court below specifically relied upon the *Ciccarelli* court's misconstruction of *Chase Securities* in rejecting the Pennocks' constitutional arguments (*see* App. A at 7a–9a). Indeed, the Commonwealth Court itself committed the error of misconstruing *Chase Securities* by relying on the above quotation divorced from the context of the decision (*see* App. A at 15a). The same problem stems from the Commonwealth Court's reliance on state cases such as *Agostin v. Pittsburgh Steel Foundry Corp.*, 47 A.2d 680 (Pa. 1946) (*see* App. A at 14a–15a), which involved whether changing a statute of limitations in a way that favored the plaintiff violated any constitutional rights of the defendant, not whether a statute of limitations can infringe a plaintiff's fundamental right of access to the courts.

blamelessly ignorant of whom to sue during the statutory period is a question worthy of being settled by this Court. *See, e.g., Bodie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"); *Logan v. Zimmerman*, 455 U.S. 422, 437 (1982) ("The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations. . . . What the Fourteenth Amendment does require, however, 'is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' . . . 'for [a] hearing appropriate to the nature of the case.' "); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requires opportunity to be heard "at a meaningful time and in a meaningful manner").[7]

7. States are split on whether extinguishing claims without the benefit of the discovery rule violates due process. *Compare Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alas. 2002) (ten-year statute of repose for personal injury, death, and property damage did not violate due process), *Harlfinger v. Martin*, 754 N.E.2d 63 (Mass. 2001) (seven-year statute of repose for medical malpractice actions did not violate due process), *Aicher v. Wisconsin Patients Compensation Fund*, 613 N.W.2d 849 (Wis. 2000) (five-year statute of repose for medical malpractice claims did not violate due process), *Garcia v. La Farge*, 893 P.2d 428 (N.M. 1995) (three-year statute of limitations for medical malpractice, without discovery rule, did not violate due process), *Musk v. Nelson*, 647 A.2d 1198 (Me. 1994) (medical malpractice statute of limitations that applied discovery rule only in foreign-object cases did not violate due process), *CLL Associates Ltd. v. Arrowhead Pacific Corp.*, 497 N.W.2d 115 (Wis. 1993) (statute of limitations that extinguished breach of contract action prior to discovery did not violate due process), *Hoffman v. Powell*, 380 S.E.2d

(Cont'd)

II. Review is Warranted to Settle Whether Interpreting a Uniform Statute of Limitations to Afford the Discovery Rule to Personal Injury Plaintiffs But Not to Wrongful Death and Survival Claimants Violates Equal Protection

A state statute of limitations that does not implicate a fundamental right satisfies the Equal Protection Clause of the Fourteenth Amendment if there is a rational basis for the distinction the statute makes. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). As covered above, however, it is arguable that extinguishing claims without the benefit of the discovery rule infringes the fundamental right of access to the courts, triggering strict scrutiny.

Whether judicial activists, interpreting a uniform statute of limitations, infringe the right of access in a manner that violates the Equal Protection Clause by applying the statute

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(Cont'd)

821 (S.C. 1989) (six-year statute of repose for medical malpractice claims did not violate due process), *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986) (three-year statute of limitation for medical malpractice without discovery rule did not violate due process), and *Anderson v. Wagner*, 402 N.E.2d 560 (Ill. 1979) (four-year statute of limitations for medical malpractice without discovery rule did not violate due process), *with Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140 (Ohio 1993) (statute of limitations that extinguished diethylstilbestrol (DES) claims before plaintiff was fully aware of injury violated due process), and *Lillicrap v. Martin*, 591 A.2d 41 (Vt. 1989) (personal injury action that had vested could not be extinguished prior to discovery by after-enacted statute of repose without violating due process). *See also Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (two-year statute of limitations for medical malpractice without discovery rule violates state constitutional open courts provision, which makes access to courts a fundamental right).

one way for personal injury claims (allowing the discovery rule to toll the limitations period) yet applying it a different way for wrongful death and survival claims (disallowing the discovery rule) is a federal question yet unanswered, and worthy of being settled, by this Court. *See, e.g., Clark v. Jeter*, 486 U.S. 456 (1988) (six-year statute of limitations for paternity actions violated equal protection under intermediate scrutiny because state allowed issue of paternity to be litigated more than six years after birth in other circumstances).[8]

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8. States are split on whether extinguishing claims without the benefit of the discovery rule violates equal protection. *Compare Hoffner v. Johnson*, 660 N.W.2d 909 (N.D. 2003) (six-year statute of repose for medical malpractice without benefit of the discovery rule did not violate equal protection), *Aicher v. Wisconsin Patients Compensation Fund*, 613 N.W.2d 849 (Wis. 2000) (five-year statute of repose for medical malpractice claims did not violate due process), *Albright v. White*, 503 S.E.2d 860 (W.Va. 1998) (twenty-year statute of limitations, without discovery rule, for injuries suffered as minor did not violate equal protection), *Adams v. Arthur*, 969 S.W.2d 598 (Ark. 1998) (two-year statute of limitations for medical malpractice did not violate equal protection), *Bonin v. Vannaman*, 929 P.2d 754 (Kan. 1996) (eight-year statute of repose for claims of persons under disability did not violate equal protection), *Garcia v. La Farge*, 893 P.2d 428 (N.M. 1995) (three-year statute of limitations for medical malpractice, without discovery rule, did not violate equal protection), *Musk v. Nelson*, 647 A.2d 1198 (Me. 1994) (medical malpractice statute of limitations that applied discovery rule only in foreign-object cases did not violate due process), *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993) (five-year statute of repose for medical malpractice did not violate equal protection), *Hawley v. Green*, 788 P.2d 1321 (Idaho 1990) (four-year statute of limitations for medical malpractice that allowed discovery rule only for foreign-object cases did not violate equal protection), *Hoffman v. Powell*, 380 S.E.2d 821 (S.C. 1989) (six-year statute of repose for medical

(Cont'd)

(Cont'd)

malpractice claims did not violate equal protection), *Cole v. Delaware League for Planned Parenthood*, 530 A.2d 1119 (Del. 1987) (medical malpractice statute of limitations that extinguished claims of 17-year-old prior to discovery but tolled claims of minors under six for longer period did not violate equal protection), *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986) (three-year statute of limitation for medical malpractice without discovery rule did not violate equal protection), *and Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) (three-year statute of repose for medical malpractice that abrogated discovery rule that otherwise applied to personal injury actions did not violate equal protection), *with Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (statute of limitations that extends discovery rule to all tort victims except victims of medical malpractice violates state constitutional privileges and immunities clause, which mirrors equal protection); *DeYoung v. Providence Medical Center*, 960 P.2d 919 (Wash. 1998) (eight-year statute of repose for medical malpractice actions violated state privileges and immunities clause, which mirrors federal equal protection clause), *Whitlow v. Board of Educ. of Kanawha Cty.*, 438 S.E.2d 15 (W.Va. 1993) (tolling provision that denied minors benefit of general tolling provision applicable to those under disability violated equal protection), *Anson v. American Motors Corp.*, 747 P.2d 581 (Ariz.App. 1987) (statute of limitations that applies discovery rule to personal injury but not wrongful death violates equal protection), *Opinion of the Justices*, 493 A.2d 1182 (N.H. 1985) (equal protection required discovery rule to apply to personal injury actions against private parties and State alike), *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (statute of limitations for medical malpractice that applied discovery rule to foreign object and knowing concealment but not to negligent misdiagnosis violated equal protection), *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984) (three-year statute of limitations for medical malpractice without discovery rule violated equal protection), and *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (medical malpractice statute of limitations that applied discovery rule only to foreign objects cases violated equal protection).

III. Review is Warranted to Settle Whether the Right of Access to State Courts is a Privilege of Federal Citizenship under the Fourteenth Amendment, and Whether Extinguishing Claims under a Statute of Limitations without the Discovery Rule Violates that Right

Finally, it is arguable under this Court's jurisprudence that the right of access to state courts is a privilege of citizens of the United States under the Privileges and Immunities Clause of the Fourteenth Amendment. *See, e.g., Lawrence v. State Tax Comm'n. of Mississippi*, 286 U.S. 276, 282 (1932) (in which this Court responded as follows to a state court's failure to address a constitutional question at issue: "the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked"); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (defendant's right to have his race included in jury pools in state court is a privilege and immunity of federal citizenship), *abrogated on other grounds, Taylor v. Louisiana*, 419 U.S. 522 (1975).

Whether a statute of limitations that extinguishes claims before the claimants could have known whom to sue infringes the fundamental right of access in a manner that violates the Privileges and Immunities Clause of the Fourteenth Amendment is a federal question yet unanswered, and worthy of being settled, by this Court.

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

DANIEL E. BRANNEN JR.
Counsel of Record
7518 Old Santa Fe Trail
Santa Fe NM 87505
(505) 820-2158

THOMAS A. LINZEY
COMMUNITY ENVIRONMENTAL
LEGAL DEFENSE FUND
675 Mower Road
Chambersburg PA 17201
(717) 709-0457

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED SEPTEMBER 15, 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1788 C.D. 2004
Argued: June 8, 2005

Russell Pennock and Antoinette Pennock, in their individual capacities and on behalf of the Estate of Daniel Pennock,

Appellants

v.

Richard V. Lenzi and Carmine D. Lenzi, in their individual capacities and dba Ridge Crest Farms, Melvin C. Gelsinger, Gale Gelsinger, Esther Gelsinger, Clarence D. Gelsinger, Rettew Associates, Inc., Berks County Conservation District and the Commonwealth of Pennsylvania Department of Environmental Protection

BEFORE: COLINS, President Judge, McGINLEY, Judge, SMITH-RIBNER, Judge, FRIEDMAN, Judge, LEADBETTER, Judge, COHN JUBELIRER, Judge, and LEAVITT, Judge.

OPINION BY JUDGE LEADBETTER

FILED: September 15, 2005

Russell and Antoinette Pennock, in their individual capacities and on behalf of the estate of Daniel Pennock, appeal the order of the Court of Common Pleas of Dauphin County (common pleas) dismissing their complaint with

prejudice on the basis that plaintiffs' wrongful death and survival actions are barred by the two year statute of limitations imposed by 42 Pa.C.S. § 5524(2). We affirm.

Plaintiffs' teenage son, Daniel, died on April 1, 1995, after contracting both rotavirus and staphylococcus infections. Nearly eight years later, on February 21, 2003, plaintiffs filed a complaint alleging that Daniel's death was caused by prolonged exposure to sewage sludge from a neighboring farm. In their complaint, plaintiffs asserted that they could not reasonably know until February 25, 2001 (when they read a newspaper article discussing a connection between sewage sludge and infections) how Daniel had contracted the infections which caused his death. Accordingly, plaintiffs argued that, under the discovery rule, which tolls the statute of limitations until a time when a tort victim can discover his injury and its cause through the exercise of reasonable diligence, their wrongful death and survival actions were timely filed. Plaintiffs sued Richard and Carmine Lenzi, in their individual capacities and doing business as Ridge Crest Farms, who processed and applied the sewage sludge; the Gelsinger family, who were the owners of the farm to which the sludge was applied; Rettew Associates, Inc., an engineering firm hired by the Lenzis to supervise the processing and application of the sludge; and the Commonwealth of Pennsylvania Department of Environmental Protection and the Berks County Conservation District, which issued permits to the Lenzis to operate their sludge business. Defendants filed a preliminary objection to plaintiffs' complaint on the ground that it was

barred by the two year statute of limitations.[1] The court of common pleas agreed, and dismissed plaintiffs' complaint with prejudice, relying upon *Pastierik v. Duquesne Light Company*, 514 Pa. 517, 526 A.2d 323 (1987). In *Pastierik* our Supreme Court confirmed an earlier plurality holding that the statute of limitations for wrongful death and survival claims begins to run, at the latest, at the time of death and cannot be extended further by the discovery rule. Plaintiffs now appeal.

Under 42 Pa.C.S. § 5524(2), "[a]n action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another" must be commenced within two years. This two year time period shall be computed "from the time the cause of action accrued." 42 Pa.C.S. § 5502(a). Normally, a cause of action accrues at the time the injury is inflicted. *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). However, in some cases where the injury or the fact that it was caused by the conduct of another is not known or discoverable through the exercise of reasonable diligence, courts have invoked the discovery rule, which delays the accrual of a cause of action and tolls the statute of limitations until a time when the injury and its cause can reasonably be discovered. *Ward v. Rice*, 828 A.2d 1118 (Pa.Super.2003).

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1. We note that preliminary objections are not the proper form in which to raise a defense based upon the statute of limitations, and would, themselves, be subject to preliminary objections. *See* Pa. R.C.P. Nos. 1028(a) and 1030(a). However, the Pennocks do not challenge the procedure by which the issue was raised.

Appendix A

In *Anthony v. Koppers Company*, 496 Pa. 119, 436 A.2d 181 (1981), our Supreme Court held, in a plurality opinion, that the statute of limitations for a wrongful death action could not be tolled by the discovery rule.[2] The *Anthony* court reasoned:

> Statutory references to the occurrence of an "injury" or the accrual of a "cause of action" are subject to judicial interpretation as to the degree of knowledge a plaintiff must possess before the statute will start to run. In contrast, the requirement that a wrongful death action be brought within [a certain period of time] after a definitely established event,—"death"—leaves no room for construction.

496 Pa. at 124, 436 A.2d at 184. The *Anthony* court further held that the discovery rule did not apply to survival actions because "survival statutes do not create a new cause of action; they simply permit a personal representative to enforce a cause of action which had already accrued to the deceased before his death." *Anthony*, 496 Pa. at 125, 436 A.2d at 185. Therefore, by definition, the statute of limitations to bring a survival action must begin to run, at the latest, at death. *Id.*

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2. The statute of limitations for wrongful death actions at the time *Anthony* was decided was the precursor to the present statute. It provided that "the [wrongful death] action shall be brought within one year after the death, and not thereafter." *Anthony*, 496 Pa. at 123, 436 A.2d at 183 [quoting Section 2 of The Act of April 26, 1855, P.L. 309, 12 P.S. § 1603, repealed by Section 2(a) of The Judiciary Act Repealer Act, Act of April 28, 1978, P.L. 202].

Appendix A

In *Pastierik*, our Supreme Court reaffirmed its holdings in *Anthony*, again refusing to apply the discovery rule to wrongful death or survival actions. *Pastierik*, 514 Pa. at 525, 526 A.2d at 327. Because Section 5524(2) and Section 5502(a) govern the statute of limitations for wrongful death, survival, and personal injury actions, the plaintiff in *Pastierik* argued, as plaintiffs do in the present case, that the discovery rule should apply equally to all of those actions. *Pastierik*, 514 Pa. at 521, 526 A.2d at 325. The *Pastierik* court rejected this argument, noting that extending the application of the discovery rule to wrongful death actions would "greatly expand, theoretically to infinity, the time period during which wrongful death actions could be brought." *Pastierik*, 514 Pa. at 521, 526 A.2d at 325-326. This, the court stated, was not the intent of the legislature in enacting the statute of limitations because death, which is a "definitely established event," puts survivors on clear notice to exercise reasonable diligence to discover the cause, and, therefore, is significantly different from personal injury, which "may be inflicted without immediate symptoms or immediately determinable causes." *Pastierik*, 514 Pa. at 522, 526 A.2d at 326. The court also recognized that extensive scientific examinations, including autopsy, which are not restrained in scope as would be examinations of living persons, can be (and often are) performed on a deceased tort victim to discover the cause of death and whether wrongful conduct was involved. *Id.* Thus, the discovery rule is not needed in a wrongful death case to prevent the statute of limitations from working an injustice on a reasonably diligent plaintiff. Accordingly, the court rejected the application of the discovery rule to wrongful death actions. *Id.*

As for survival actions, the *Pastierik* court agreed with the principle set forth in *Anthony* that a survival action is merely a cause of action which had already accrued to a decedent before his death and is now being prosecuted by his representatives. *Pastierik*, 514 Pa. at 523, 526 A.2d at 326. Therefore, the statute of limitations begins to run when the decedent, and not his representatives, could have discovered his injury and its cause through the exercise of reasonable diligence. *Id.* Moreover, even if the injury or its cause was not reasonably discoverable to the decedent, the clear notice afforded to his survivors and the extensive scientific examinations available to them make extending the statute of limitations, beyond the two years after death prescribed by the legislature, unnecessary. *Pastierik*, 514 Pa. at 523, 526 A.2d at 327. Thus, the court held that, for survival actions, the cause of action accrues and the two year statute of limitations begins to run, at the latest, at death. *Id.*

Plaintiffs argue on appeal that the *Pastierik* decision violates the remedies, due process, and equal protection clauses of the Pennsylvania Constitution, as well as the privileges and immunities, due process, and equal protection clauses of the United States Constitution. Alternatively, plaintiffs contend that even if *Pastierik* is constitutional, it is wrong as a matter of Pennsylvania law.[3]

We begin our analysis by rejecting plaintiffs' last argument out of hand. *Pastierik* is clearly the law of Pennsylvania, announced in an unequivocal holding of our

3. Plaintiffs' appeal presents only questions of law which are subject to this court's plenary review. *Reich v. Berks County Intermediate Unit No. 14*, 861 A.2d 1005 (Pa.Cmwlth. 2004).

Supreme Court. Even if we believed it were wrongly decided— which we do not—we would be bound to follow it, as was common pleas. *See Lovrinoff v. Pa. Turnpike Comm'n*, 3 Pa.Cmwlth. 161, 281 A.2d 176 (1971). Next, with respect to plaintiffs' constitutional arguments, we flatly reject the notion that in deciding *Anthony* and *Pastierik* our Supreme Court was unmindful of its obligation to interpret statutory law in accordance with constitutional mandates. Simply because the court did not address these constitutional issues directly should not, in any way, suggest that it set such concerns aside, to be considered on some other occasion. On the contrary, we not only assume that our Supreme Court always takes constitutional principles into account when deciding issues of common law, we find its analysis in *Pastierik* specifically addresses the concerns underlying plaintiffs' constitutional claims, even though not discussing them in the context of constitutional arguments.

Moreover, these arguments have been directly addressed by two other courts, the United States Court of Appeals for the Third Circuit and the Superior Court of Pennsylvania. In *Gravinese v. Johns-Manville Corp.*, 324 Pa.Super. 432, 471 A.2d 1233, 1238 (1984), the Superior Court rejected the claim that the decision in *Anthony* (*Pastierik* had not yet been decided) "rendered the statute [of limitations for wrongful death and survival actions] unconstitutional on equal protection and due process grounds." *Id.* at 1237. It noted that "[s]ubject only to the rule that a reasonable time to sue must be allowed, statutes of limitations pertain to remedies and do not impair fundamental rights." *Id.* at 1238. The Third Circuit similarly rejected these arguments in *Ciccarelli v.*

Carey Canadian Mines, Ltd., 757 F.2d 548 (3d Cir.1985).[4] In so doing, the court noted that:

> There is no absolute and unlimited constitutional right of access to the courts. All that is required is a reasonable right of access—a reasonable opportunity to be heard. . . . Plaintiffs' due process claim must therefore fail because here the period is reasonable.
>
> Plaintiffs also insist that by distinguishing between personal injury claims on the one hand and wrongful death and survival actions on the other, i.e., by not extending time periods for the latter through the discovery rule while extending them for the former, the statutes as interpreted violate equal protection. The distinction does not implicate a suspect class nor a fundamental right; consequently, if the distinction is rationally related to a legitimate government interest it does not violate equal protection. A distinction between wrongful death and survival actions, and those personal injury actions brought by living plaintiffs, is related to the state's interest—and those of the survivors—in the prompt settlement of the economic and legal affairs of the deceased.

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4. We note that the equal protection and due process provisions of the Pennsylvania Constitution are analyzed under the same standards employed by the United States Supreme Court in reviewing like claims under the United States Constitution. *Griffin v. Southeastern Pa. Transp. Auth.*, 757 A.2d 448, 451 (Pa.Cmwlth. 2000).

> The state legislature may not be said to be irrational in encouraging a personal representative to bring suit promptly.

Id. at 554-56 (citations omitted). We agree. Moreover, as set forth above, the court in *Pastierik* extensively documented the reasonable grounds for providing a more restrictive limitation on death claims than on personal injury actions.

Nonetheless, plaintiffs assert the notion that, contrary to these holdings, Article I, Section 11 of the Pennsylvania Constitution, often called the "remedies clause," provides an absolute and fundamental right to sue for any injury. Thus they argue that the remedies clause mandates strict scrutiny of any limitation of that right.[5] In making this argument, plaintiffs misunderstand the import of Article I, § 11, which provides:

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5. When reviewing equal protection claims, a court must first decide which level of scrutiny is to be applied to the challenged state action: strict, intermediate, or rational basis. If the state action infringes upon a fundamental right or implicates a suspect classification, such as race or religion, then it is analyzed using strict scrutiny. *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995). If the state action infringes upon an important interest, such as a liberty interest or some other interest vital to the individual, or implicates a sensitive classification, such as gender, then intermediate scrutiny is utilized. *Id.* If the state action involves neither of these, it will be analyzed under a rational basis level of scrutiny. *James v. Southeastern Pa. Transp. Auth.*, 505 Pa. 137, 144, 477 A.2d 1302, 1305 (1984). The person challenging the state action bears the burden of showing that it fails to satisfy the applicable standard of scrutiny. *Paz v. Pa. Housing Finance Agency*, 722 A.2d 762, 766 (Pa.Cmwlth.1999).

Appendix A

> All courts shall be open; and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

As our Supreme Court has explained, "the guarantee of a 'remedy by due course of law' in Article I, Section 11, means that a case cannot be altered, in its 'substance', by a subsequent law . . ." *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 149, 842 A.2d 919, 926 (2004). In other words, once a cause of action has accrued it becomes a vested right, which under Article I, Section 11, may not be eliminated by subsequent legislation. *Id.* at 155-56, 842 A.2d at 930. It simply does not mean that the General Assembly may not abridge or limit a cause of action which has not yet accrued.[6] Indeed, a claim that the remedies clause established a fundamental right to sue the Commonwealth, thus requiring strict scrutiny of the limitation of actions provision of the Metropolitan Transportation Authorities Act,[7] was rejected in *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa.

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6. It is undisputed, of course, that both the statute of limitations at issue and the decision in *Pastierik* occurred long before the death of Daniel Pennock.

7. The provision at issue in *James*, Section 2036 of the Metropolitan Transportation Authorities Act of 1963, P.L. 984 § 36, formerly 66 P.S. § 2036, was repealed by Act of April 28, 1978, P.L. 202, No. 53, § 2(a)(1371).

137, 477 A.2d 1302 (1984). In that case, our Supreme Court reasoned:

> The question, therefore, as to whether the notice classification affects a fundamental right is to be determined by whether the right affected—that of access to the courts in suits against the Commonwealth—is to be found in the constitution. To ask the question is to answer it. As we have seen, Art. I, § 11 of the Pennsylvania Constitution explicitly reserves to the Commonwealth the power to determine in which cases it will be sued. This power, in turn, is derived from the Eleventh Amendment to the United States Constitution, permitting the states to exercise sovereign immunity, should they choose so to do. We conclude, therefore, that there is no "fundamental right" to sue the Commonwealth, for such right is explicitly limited by Art. I, § 11 of the Constitution of Pennsylvania. Since it is not contended that any suspect classification has been made, and we have concluded that there is no fundamental right at issue, strict scrutiny of the statute is inappropriate.

Id. at 146, 477 A.2d at 1306. The court adopted the same analysis, reaching the same conclusion with regard to the statutory cap on claims against political subdivisions in *Smith v. City of Philadelphia*, 512 Pa. 129, 516 A.2d 306 (1986), *cert. denied*, 479 U.S. 1074, 107 S.Ct. 1265, 94 L.Ed.2d 127 (1987). *See also Griffin v. Southeastern Pa. Transp. Auth.*, 757 A.2d 448 (Pa.Cmwlth.2000), and cases cited therein

(rejecting fundamental right claim, and finding statutory cap on damages against the Commonwealth does not offend due process or equal protection clauses under intermediate standard of review.)

The Pennocks attempt to distinguish *James* by arguing that since the remedies clause contains no reservation to the Commonwealth to determine which suits may be brought against private entities, such right must be unqualified. The flaw in this reasoning is that, although the clause is silent both as to any right and any limitations on such right to sue non-Commonwealth parties, it is well-established that the General Assembly may limit or even abrogate causes of action which have not yet accrued. Even causes of action which existed at common law may be abolished by the legislature. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715 (1978). "In interpreting [the remedies clause], we should remember that no one 'has a vested right in the continued existence of an immutable body of negligence law. . . . [T]he practical result of a [contrary] conclusion would be the stagnation of the law in the face of changing societal conditions.' " *Id.* at 279-80, 382 A.2d at 720. *A fortiori*, if actions which existed at common law may be abolished, so may statutory causes of action created by the legislature,[8] and if they may be abolished, they may be limited

8. Wrongful death actions are solely creatures of statute, having not existed at common law. *Hodge v. Loveland*, 456 Pa.Super. 188, 690 A.2d 243, 245 (1997), *citing Frazier v. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962). At common law, an action for personal injury did not survive death and, therefore, a survival action on behalf of the decedent's estate is also a statutory creation. *See Moyer v. Phillips*, 462 Pa. 395, 399, 341 A.2d 441, 442-43 (1975).

without offending the remedies clause. *James*; *Smith*, 512 Pa. at 134, 516 A.2d at 309; *Griffin*, 757 A.2d at 451.

In addition, as in *James*, since no fundamental right is implicated, and no suspect classification is alleged, strict scrutiny of the limitation is inappropriate. Rather, the interest is an "important" one, deserving of intermediate scrutiny. *James*, 505 Pa. at 146-47, 477 A.2d at 1306. To pass muster under this level of scrutiny, the governmental interest must be an important one, and the classification must be narrowly drawn so as to be closely related to the objectives of the legislation and affect only those persons intended to be affected. *James*, 505 Pa. at 147-48, 477 A.2d at 1307. Although *Gravinese* and *Ciccarelli* applied a rational basis test, and *Pastierik* did not engage in a due process or equal protection analysis as such, we believe that the reasons described in those cases amply satisfy the intermediate scrutiny standard of review.

As noted, statutes of limitations serve an important state interest by preventing a plaintiff from sleeping on his rights "until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-349, 64 S.Ct. 582, 88 L.Ed. 788 (1944). In sum, they prevent the passage of time from adversely affecting an alleged tortfeasor's ability to defend himself. Accordingly, the discovery rule should only be applied when it is necessary to prevent the statute from working an injustice on a reasonably diligent plaintiff. As the *Pastierik* court recognized, because of the clear notice that death provides, combined with the ability to perform unrestricted testing to discover its cause, the need for a

discovery rule is less compelling in wrongful death or survival actions than in ordinary injury claims, which may be "inflicted without immediate symptoms or immediately determinable causes . . . [and] shrouded by indefinite factors." 514 Pa. at 522, 526 A.2d at 326. The distinction between personal injury actions and wrongful death and survival actions is thus reasonably related to serving the legitimate state interest of preventing a plaintiff from sleeping on his rights to the detriment of the defendant. Therefore, as in *James*, "we conclude that the statute passes constitutional muster under both the Fourteenth Amendment and Art. I, § 26 of the Pennsylvania Constitution." 505 Pa. at 148, 477 A.2d at 1307.[9]

The Pennocks' state and federal due process claims fail for the same reasons, as the concerns of those provisions are closely intertwined with the concerns of the equal protection and remedies clauses. Our Supreme Court has long held that "[n]o one has a vested right in a statute of limitations or other procedural matters. The legislature may at any time alter, amend or repeal such provisions without offending constitutional restraints. So long as there is no omission of a remedy for the enforcement of a right for which a remedy existed when the right accrued, a want of due process is in no way involved." *Bible v. Dep't of Labor & Indus.*, 548 Pa. 247, 254, 696 A.2d 1149, 1152 (1997) [quoting *Agostin v. Pittsburgh Steel Foundry Corp.*, 354 Pa. 543, 548-49, 47 A.2d

9. We note that some courts have found that wrongful death and survival claimants are not in the same class of persons as personal injury claimants, and, thus, an equal protection analysis is unnecessary. *See, e.g., Tiedeken v. Tiedeken*, 363 N.W.2d 909, 911 (Minn.Ct.App.1985). *See also Gravinese*, 471 A.2d at 1238.

680, 683 (1946) (superseded, as recognized in *Bible*, by 1974 amendments to the Workers' Compensation Act)]. As the United States Supreme Court concluded in *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), as a matter of constitutional law, "statutes of limitation go to matters of remedy, not to destruction of fundamental rights." Thus, so long as the statute of limitations provides for a reasonable time period for a plaintiff to bring suit, the statute will be upheld. *Id. Accord Gravinese*, 471 A.2d at 1238. Because of the clear notice that death provides, combined with the ability to perform an autopsy to discover its cause, the two years prescribed by the legislature afford a decedent's representatives a reasonable opportunity to bring suit.

We also must reject plaintiffs' argument that *Pastierik* violates the privileges and immunities clause of the United States Constitution. It is well-settled that the clause is to be narrowly construed, and does not require that a state always apply all of its laws equally. *Com. v. Lightman*, 339 Pa.Super. 359, 489 A.2d 200, 204 (1985). Furthermore, the Supreme Court has severely limited the applicability of the clause to only those privileges and immunities "bearing on the vitality of the Nation as a single entity." *Baldwin v. Mont. Fish and Game Comm'n*, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978). It cannot be said that our Supreme Court's refusal to apply the discovery rule to wrongful death and survival claims, claims which would not exist but for the grace of the Pennsylvania legislature, has any impact on the vitality of the nation.

Accordingly, we see no constitutional error in common pleas' application of *Pastierik* to the present case. Further, we agree with the trial court that, as their claims are barred by 42 Pa.C.S. § 5524(2), granting plaintiffs leave to amend their complaint would be fruitless,[10] and thus affirm the dismissal of plaintiffs' complaint with prejudice.[11]

s/ Bonnie Brigance Leadbetter
BONNIE BRIGANCE LEADBETTER, Judge

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10. *See Kearney v. City of Phila.*, 150 Pa.Cmwlth. 517, 616 A.2d 72 (1992) (holding that a trial court did not abuse its discretion by denying a plaintiff leave to amend where further amendment could not circumvent defendant's immunity).

11. Because we hold that the discovery rule is inapplicable to wrongful death and survival claims and, thus, the statute of limitations bars plaintiffs' claims, we need not address the issue of plaintiffs' failure to substantially state a claim against Rettew Associates, Inc.

APPENDIX B — OPINION AND ORDER OF THE COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA DATED JUNE 30, 2004

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 2003 CV 0848

CIVIL ACTION - LAW

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Plaintiffs

v.

RICHARD V. LENZI, CARMINE D. LENZI, Individually and d/b/a RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants

BEFORE TURGEON, CLARK AND BRATTON, JJ.

OPINION

Currently before the court are the preliminary objections filed by defendant Rettew Associates, Inc. For the reasons set forth below, the defendant's preliminary objections are sustained.

Appendix B

Background

The facts, as alleged in plaintiffs' complaint and taken to be true for the purpose of ruling upon these preliminary objections, are as follows: Plaintiffs' teenaged son, Daniel Pennock, died April 1, 1995, after contracting both a rotavirus and a staphylococcus aureus (staph) infection. Plaintiffs allege that Daniel contracted the rotavirus and staph from prolonged exposure to dust and fumes emitted from pathogens found in Class B sludge, which had been applied to a farm located across the street from the Pennocks' home between 1988 and 1995. It is alleged that Daniel's lungs, throat and mouth were susceptible to these pathogens by having inhaled lime, which was used to stabilize the sludge prior to its application on the farm. Plaintiffs claim they first became aware on February 25, 2001 that their son's death might be related to his exposure to sewage sludge, after having read several local newspaper articles about the health risks posed by sewage sludge. On February 21, 2003, Daniel's parents, plaintiffs Russell and Antoinette Pennock, filed their complaint asserting claims under the wrongful death and survival statutes.

The complaint identifies four defendant entities as responsible for their son's death: the Lenzi defendants, who operated the facility that processed and spread the sludge; the Gelsinger defendants, who owned the farm upon which the sludge was applied; two governmental agencies, Commonwealth of Pennsylvania Department of Environmental Protection (DEP), which issued permits to the Lenzi defendants to operate their sludge business and oversaw compliance with DEP regulations, and the Berks

County Conservation District, which worked in conjunction with and under the direction of the DEP; and finally, moving defendant Rettew Associates, a professional engineering and consulting company hired by the Lenzi defendants "to oversee the sludge process conducted by [the Lenzi defendants] and the application of the sludge at the Gelsinger farms." (Complaint ¶ 25)

The Lenzi defendants, through Richard Lenzi, doing business as Ridge View Farms, had been initially granted a permit in 1987 by the DEP (then known as the Department of Environmental Resources), to operate a facility to process and dispose of Class B sludge collected by a Downingtown treatment plant. Ridge View Farms was located on a Berks County farm owned by defendant Carmine Lenzi, who is a partner with Richard Lenzi in Ridge View Farms. The permit granted Richard Lenzi a license to apply sludge on the 287-acre Gelsinger farm.

The allegations of Rettew's connection to the events, as pled, consist of the following: The Lenzi defendants hired defendant Rettew in 1991 to oversee or manage the sludge process conducted by the Lenzi defendants and the application of sludge to the Gelsinger farm. (Complaint ¶ 25; Preliminary Objections ¶ 12) Plaintiffs allege Rettew oversaw the application of 1406 tons of sludge to the Gelsinger farm in 1991, 1431 tons in 1992, 1549 tons in 1993, and 1234 tons in 1994. (Complaint ¶¶ 31-34) In 1995, 1401 tons were applied to the Gelsinger farm through just the first three months of the year. (Complaint ¶¶ 35-36) Plaintiffs note also that the Lenzi defendants were prohibited from applying sludge to frozen or snow covered ground. (Complaint ¶ 19)

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Plaintiffs also state that the annual operations report submitted by the Lenzi defendants, under the signature of a Rettew engineer, indicated that beginning in 1988, the Gelsinger farm was receiving sludge applications five times per week on ten fields covering approximately 300 acres. (Complaint ¶ 29) Rettew was also responsible for seeking renewal of the Lenzi defendants DEP permit. (Complaint ¶ 25) Rettew's application was successful and the Lenzi defendants permit was renewed in October 1993 for a ten-year period. Plaintiffs aver that the renewed permit allowed application of sludge at both Ridge Crest Farms and the Gelsinger farm, although the sludge was applied only to the Gelsinger farm according to the annual operations report submitted by Ridge Crest Farms, again under the signature of a Rettew engineer. (Complaint ¶ 30)

Legal Discussion

Defendant Rettew's primary preliminary objection is in the nature or a demurrer, wherein it asserts the complaint should be dismissed for failure to state a claim under Pa.R.C.P. 1028(a). Rettew also alleges that the complaint is insufficiently specific under Pa.R.C.P. 1028(a), and fails to conform to Pa.R.C.P. 1042.2 on the basis that the plaintiffs failed to expressly state they are seeking to impose liability upon Rettew as the result of a breach of a professional obligation.

A demurrer tests the legal sufficiency of the complaint. In deciding whether a demurrer is warranted, the court admits as true all material facts set forth in the complaint and all inferences reasonably deducible therefrom. The

question presented is whether, on the facts averred, the law says with certainty that no recovery is possible; where any doubt exists, the demurrer should be overruled. *Belser v. Rockwood Cas. Ins. Co.*, 791 A.2d 1216, 1219 (Pa. Super. 2002) (citations omitted). Rettew argues the plaintiffs have failed to allege any facts establishing that it had a professional duty relating to the application, processing or storage of sludge, that it committed an error or omission breaching any such professional duty, or that their was a causal connection between the alleged breach and the injuries suffered by the decedent. We agree with the moving defendant, and accordingly, sustain Rettew's demurrer.

This court's close examination of plaintiffs' complaint indicates that viable allegations of duty, breach and causation are entirely absent against defendant Rettew. Plaintiffs have broadly alleged only that Rettew had a duty "to oversee the sludge process conducted by [the Lenzi defendants] and the application of the sludge at the Gelsinger farms." (Complaint ¶ 25) While this claim might subsume other specific allegations in the complaint, such specific allegations, including inferences reasonably deducible therefrom, do not exist. For instance, plaintiffs make their most specific allegations against the DEP, which had authority to regulate the land application of sewage sludge. Plaintiffs assert that the DEP failed to perform its regulatory duties including ensuring the Lenzi defendants followed reporting requirements, analyzing reports received, performing spot inspections to determine the level of toxins incorporated into the soil, and ensuring that the land used for sludging was properly marked. (Complaint ¶ 55) Plaintiffs also assert the DEP adopted faulty regulations that were enacted by the EPA

without proper testing or oversight. (Complaint ¶ 56) As a result, plaintiffs claim facilities owned by the Lenzis committed numerous undetected violations causing a dangerous physical hazard to the community around the Gelsinger farm. (Complaint ¶ 57) None of these allegations are directed at Rettew.

Plaintiffs otherwise raise a myriad of broad allegations of duty, but do not fault Rettew anywhere for having breached any such duty. For instance, in one of the few specific allegations aimed at Rettew, plaintiffs assert that Rettew oversaw what plaintiffs note was a much greater than normal amount of sludge application in the first three months of 1995, additionally noting that sludge may not be applied on frozen or snow covered ground. (Complaint ¶¶ 35-36) Plaintiffs, however, make no allegation that too much sludge was in fact actually applied in 1995, or that any sludge was applied to frozen or snow covered ground.

Plaintiffs also assert that the DEP permits granted to the Lenzi defendants required, among other things, that the sludge was to be applied in thin layers, was to be turned over and incorporated into the soil within 24 hours of application, was not to be applied during periods of rain, to saturated ground, frozen ground, or ground covered with snow, was not to be applied within 50 feet of property lines or 300 feet of an occupied dwelling, and was not to be applied in quantities that would result in run-off, vector, or odor problems. (Complaint ¶ 19) Despite this litany of obligations, plaintiffs have not asserted that any of them were violated, except insofar as the Lenzi defendants were cited by DEP on

three occasions, in 1988 and 1990, respectively, prior to Rettew's hiring by the Lenzi defendants.[1]

Plaintiffs also allege in their complaint that as of April 1988, DEP's sludge processing regulations required the Lenzi defendants, to among other things, submit operating reports, obtain commercial liability insurance and perform a quarterly self-test of the digestion method they used to process sludge and report these results to DEP. (Complaint ¶ 23) No allegations have been made that the Lenzi defendants failed to abide by these requirements, or how Rettew was responsible in any way.

Plaintiffs allege under the renewed permit that the Lenzi defendants were allowed to apply sludge to both the Gelsinger farm and Ridge View Faints, and also allowed them to apply only the sludge generated by the Downingtown waste treatment facility. (Complaint ¶ 27, 30) Plaintiffs again, however, stop short of claiming that sludge was over-applied to the Gelsinger farm or that they obtained sludge from a source other than Downingtown. In any event, plaintiffs have failed to connect Rettew to these particular averments.

Plaintiffs also aver that under applicable CFR regulations, the Class B sludge applied by the Lenzi defendants was required to be self-tested for pathogens at the time of use or at the time of disposal and was also required

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1. Plaintiffs have pled that the Lenzi defendants were cited twice in 1988 for applying sludge to frozen ground and storing sludge on site, respectively, and once in 1990 for failing to incorporate sludge into the soil within 24 hours of application. (Complaint ¶¶ 41-42, 46)

to be stabilized with lime. (Complaint ¶¶ 38-39) Furthermore, under DEP regulations, sludge that: could not be spread due to ground conditions or machinery, could not be stored on-site for later application but had to be disposed of at a landfill. (Complaint ¶ 40) Again, despite highlighting these obligations, plaintiffs have not asserted they were not complied with, or specifically how Rettew was involved.

Finally, plaintiffs state that both the Lenzi and Gelsinger defendants committed un-cited DEP violations by failing to mark the land as having been applied with sludge, failing to inform persons living adjacent to the sludge farm when sludging would commence, and otherwise failing to restrict the use or access to the farm land for any period of time during the years that sludge was applied. (Complaint ¶¶ 43, 44, 48) Plaintiffs also aver that the Gelsinger defendants violated applicable rules and regulations by letting the decedent, his father and brother hunt on land to which sludge had been recently applied. (Complaint ¶¶ 47-48) Again, plaintiffs have failed to connect Rettew in any way to these un-cited regulatory violations.

Plaintiffs have argued that should the court find their complaint wanting in some manner that the court grant them leave to amend. Defendant Rettew has countered that leave to amend should not be granted since any amendment would be barred by the two-year statute of limitations. We agree with Rettew. On October 14, 2003, the Honorable Richard Lewis issued a memorandum order sustaining the preliminary objections of the Lenzi defendants, Gelsinger defendants and defendant Berks County Conservation District. That order barred plaintiffs' claims against those defendants then under

the applicable two-year statute of limitations on the basis that the law in Pennsylvania precludes application of the discovery rule to toll the statute of limitations in wrongful death and survival actions. *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987). Inasmuch as Judge Lewis' decision is the law of the case under the coordinate jurisdiction rule, amendment would clearly be a fruitless exercise. *See*, *Zane v. Friends Hospital*, 836 A.2d 25, 29 (Pa. 2003)

Accordingly, we enter the following:

ORDER

AND NOW, this 30th day of June, 2004 the Preliminary Objections filed by Defendant Rettew Associates, Inc. are hereby SUSTAINED. Plaintiffs' Complaint is dismissed as to the moving defendant, with prejudice.

BY THE COURT:

s/ Jeannine Turgeon
Jeannine Turgeon, Judge

APPENDIX C — MEMORANDUM ORDER OF THE COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA DATED OCTOBER 14, 2003

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 2003 CV 848

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Plaintiffs

v.

RICHARD V. LENZI, CARMINE D. LENZI, in their individual capacities and d/b/a RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT and THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants

Before KLEINFELTER, LEWIS and CLARK, JJ.

MEMORANDUM ORDER

AND NOW, this 14th day of October 2003, upon consideration of the Preliminary Objections submitted by Defendants Lenzi, Gelsinger and Berks County Conservation

District, the parties' legal memoranda, and oral argument held September 18, 2003, IT IS HEREBY ORDERED that Defendants' Preliminary Objection to Plaintiffs' Complaint on the basis that Plaintiffs' claims are barred by the two-year statute of limitations is SUSTAINED.

While this court is sympathetic to plaintiffs' argument that it is illogical for the discovery rule to apply to causes for personal injury, but not wrongful death, we are constrained by our Supreme Court's ruling in *Pastierik v. Duquesne Light* Co. 526 A.2d 323 (1987). In *Pastierik*, the majority refused to toll the statute of limitations for wrongful death by reason of the discovery rule "[b]ecause death is not an event that is indefinite as to the time of its occurrence, and because survivors are immediately put on notice that they may proceed to determine the cause of death . . ." *Id.* at 324.

Further, based on this court's ruling resulting in the dismissal of Plaintiffs' claims, all other preliminary objections raised by the Defendants are deemed moot.

BY THE COURT:

s/ Richard A. Lewis
Richard A. Lewis, Judge

APPENDIX D — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED APRIL 19, 2006

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 846 MAL 2005

RUSSELL PENNOCK AND ANTOINETTE PENNOCK, IN THEIR INDIVIDUAL CAPACITIES AND ON BEHALF OF THE ESTATE OF DANIEL PENNOCK,

Petitioners

v.

RICHARD V. LENZI AND CARMINE D. LENZI, IN THEIR INDIVIDUAL CAPACITIES AND D/B/A RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents

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ORDER

PER CURIAM

AND NOW, this 19th day of April, 2006, the Petition for Allowance of Appeal is hereby DENIED.